Vol 31

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IN THE

Supreme Court of the United States

No. 136

C AND C ICE CREAM COMPANY, Inc., - Petitioner,

vs.

EWING-VON ALLMEN DAIRY COMPANY,
NATIONAL ICE CREAM COMPANY, - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

JOSEPH S. LAWTON,
JOSEPH SOLINGER,
CLAUDE HUDGINS,
Attorneys for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

[REFERENCES REQUIRED BY RULES 12 AND 27]

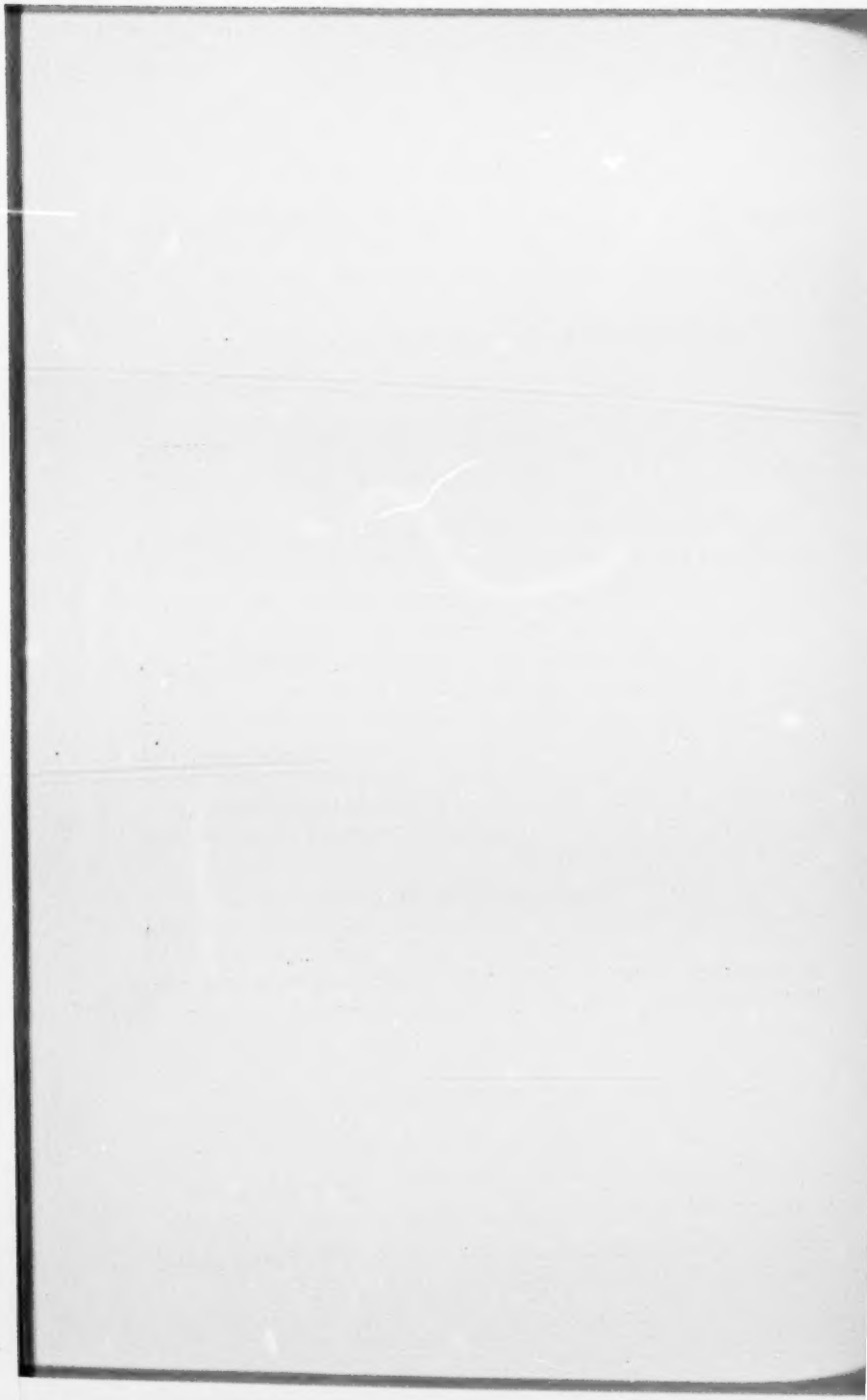
OPINION BELOW: Ewing Von-Allmen Dairy Company, Inc., *et al.*, v. C and C Ice Cream Company, Inc., 109 Fed. (2d) 898 (R., pp. 128-130).

JURISDICTIONAL AUTHORITY: Judicial Code 240 and 238 as amended by Acts February 13, 1925.

DATE OF JUDGMENT: February 15, 1940 (R., p. 127); petition for rehearing denied March 13, 1940 (R., p. 141).

QUESTIONS PRESENTED: Both petitioner and respondents were engaged in the manufacture and sale of ice cream in interstate commerce between the State of Kentucky and the State of Indiana. Respondents attempted to and did monopolize petitioner's business. The Sixth Circuit Court of Appeals held that this did not affect or burden interstate commerce, and the record contained no proof of conspiracy to restrain such commerce.

THE REASON RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI: The Sixth Circuit Court of Appeals' decision reversing this case is in direct conflict with the decisions of the Supreme Court of the United States and creates a conflict of decisions between the Circuit Courts of Appeals.



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C AND C ICE CREAM COMPANY, INC., - *Petitioner,*

v.

EWING-VON ALLMEN DAIRY COMPANY, INC.,
NATIONAL ICE CREAM COMPANY,
INC., - - - - - - - - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petitioner, the C and C Ice Cream Company, Inc., respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

In April, 1938, this petitioner was given a judgment in the United States District Court for the Western District of Kentucky at Louisville against the respondents the Ewing-Von Allmen Dairy Company, Inc., and the National Ice Cream Company, Inc., for $6,000 damages to petitioner by reason of respondents' attempted monopolization of the ice cream busi-

ness in Louisville, Kentucky, which affected interstate commerce in and around Louisville, Kentucky, in violation of the Clayton Anti-Trust Act, Sections 1, 2 and 15, and also a judgment for $750 attorneys' fee for petitioner's counsel.

That respondents appealed said action to the Circuit Court of Appeals for the Sixth Circuit at Cincinnati, Ohio and that on the 15th day of February, 1940, the said Circuit Court of Appeals for the Sixth Circuit entered a final order reversing said judgment, holding petitioner was not entitled to recover, and on March 13, 1940, said Court denied a petition for rehearing.

A certified copy of the entire record of said case in the said Circuit Court of Appeals is hereby furnished, attached to and made a part of this application and marked Exhibit "A" in compliance with Rule 35 of this Honorable Court.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Section 240, Judicial Code.

II.

This case was decided in the United States Circuit Court of Appeals upon the erroneous idea:

(a) That the ingredients which came from without the state ceased to be a part of interstate commerce when manufactured into ice cream and were beyond

the regulatory powers of Congress over interstate commerce.

(b) Upon the erroneous idea that the attempt to monopolize the ice cream business did not create a direct and substantial burden on interstate commerce.

(c) That the ingredients used by the parties in the manufacture of ice cream shipped from out of the State of Kentucky into Kentucky are not affected by the monopolization of this business.

(d) Said Court erroneously held that the facts in this case were not shown in any way to affect interstate commerce, notwithstanding, the respondents used every unlawful tactic possible to put the petitioner out of business and attempted in the most ugly manner to obtain a monopoly on that business; both parties being engaged in interstate commerce and were also shipping a great part of the ingredients going into ice cream from out of the State into Kentucky.

(e) The said Court erred in holding that, "the record contained no proof of conspiracy to restrain such commerce."

(f) Said holdings were in direct conflict with the decision of the Supreme Court of the United States and should be set aside by this Court.

III.

JURISDICTION.

This is a civil action for damages caused by a violation of the Clayton and Sherman Anti-Trust Acts, U. S. C. A., Title 15, Section 1, 2 and 15; date of judgment February 15, 1940, Petition for Rehearing denied March 13, 1940, and the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. 347).

IV.

PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals for the Sixth Circuit in said case, entitled Ewing-Von Allmen Dairy Co., Inc., and the National Ice Cream Company, Inc., versus C and C Ice Cream Company, Inc., No. 8089, to the end that said case may be reviewed or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the

Judicial Code and that the said judgment of the said Circuit Court of Appeals in the said case every part thereof may be reversed by this Honorable Court.

C AND C ICE CREAM COMPANY,
Petitioner,

JOSEPH S. LAWTON,
JOSEPH SOLINGER,
CLAUDE HUDGINS,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

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C AND C ICE CREAM COMPANY, INC., - *Petitioner,*

v.

EWING-VON ALLMEN DAIRY COMPANY, INC., NATIONAL ICE CREAM COMPANY, INC., - - - - - - - *Respondents.*

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

On April 4, 1938, the petitioner recovered a judgment in the United States District Court for the Western District of Kentucky against the respondents for $6,000 for an alleged violation of the Clayton Anti-Trust Act in a conspiracy and attempt to monopolize their business which affected interstate commerce, and $750.00 for attorneys' fee (T. R. 34 and 35). Respondents appealed from that judgment to the United States Circuit Court of Appeals for the Sixth Circuit. On February 15, 1940, that Court reversed the judgment of the lower Court holding that the petitioner, plaintiff below, could not recover for the reasons that the transactions complained of did not create a direct

and substantial burden on interstate commerce, and that the ingredients which came from without the State ceased to be a part of interstate commerce when manufactured and sold in Kentucky and were beyond the regulatory powers of Congress; and that it was not shown that there was a conspiracy to restrain such commerce, and that the motion for peremptory should have been sustained.

On the trial of the case it was shown that both the plaintiff and the defendants were engaged in the manufacture of ice cream and shipped it from the State of Kentucky into the State of Indiana; that they both purchased ingredients that go into the making of ice cream—such as cream, butter-fat, fruits, flavoring extracts, gelatin and sugar, outside of the State of Kentucky and had it shipped into the State of Kentucky for the operation and maintenance of their business. That the respondents resorted to the most aggravated and vindictive means to monopolize and run the petitioner out of business, and that they made statements at diver times showing that that was their intention to monopolize this business and run this petitioner out of business (T. R. 53, 58, 72 and 75).

ARGUMENT.

The Sixth Circuit Court of Appeals in reversing this case states:

> "While the bulk of the raw ingredients used by the parties in the manufacture of ice cream comes from Kentucky, the gelatin, fruit and flavoring and part of the cream comes from outside the state. It is not shown that appellants' acts have shown any reduction or monopolization of these supplies."

The case cited in support of that holding—the case of United Leather Workers v. Herkert, 265 U. S. 457, was an injunction, an extraordinary remedy, to restrain a strike; all acts complained of were local and the purpose of the strike was not an attempted monopoly but an effort to improve their conditions and get a better wage. Chief Justice Taft, in the learned opinion, after discussing its relativity to interstate commerce and citing many authorities, said:

> "This view of the case makes it clear that the mere reduction in supplies and articles to be shipped in interstate commerce by the *illegal or tortuous* (italization ours) prevention of its manufacture is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the articles is to enable those preventing the manufacturing to *monopolize* (italization ours) the supply, control its price or discriminate between its would be purchaser that the unlawful

> interference with its manufacture can be said directly to burden interstate commerce."

The Sixth Circuit did not apply the facts in this case before the Court to the holdings in the case cited because the facts in this case clearly bring it within the latter part of the opinion quoted.

II.

The Sixth Circuit Court of Appeals in reversing this case, states:

> "It is necessary that appellee prove that the dealings of appellants which form the subject-matter of the complaint operate substantially and directly to restrain and burden interstate commerce. * * * We do not regard the transactions complained of as creating direct and substantial burden on interstate commerce."

They cite for their reason in so holding the case of Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453. That was an equitable action seeking an injunction or restraining order which alleged a violation of Section 1 of the Clayton Anti-Trust Act which reads as follows to-wit:

U. S. C. A., Title 15:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or

conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

This Court in the Santa Cruz case did not hold that the acts complained of must substantially affect interstate commerce, but that they must substantially *relate* to interstate commerce; we quote from Chief Justice Hughes:

> "Where Federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that their is a close and substantial relation to interstate commerce in order to justify federal intervention."

We can understand why the Court did use the words "substantial relation" in that case, because that action sought a restraining order against acts which were wholly local and intrastate and clearly with no intention or interfering with interstate commerce; and to bring acts of that character within the purview of the federal law it must have a substantial relation to interstate commerce. In the present case, however, the complaint charges an attempt to monopolize a business which affects a part of interstate commerce in violation of Section 2 of the Anti-Trust Act. Said section reads as follows:

U. S. C. A., Title 15:

> "Section 2. Every person who shall monopolize or attempt to monopolize, or combine or con-

spire with any other person or persons, to monopolize *any part* of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In the wording of this Section, Congress does specifically say what part of the trade or commerce among the several States must be affected. Apparently in order to prevent the Courts from construing that section to mean a certain per cent or a substantial part, they say, "*any part* of the trade or commerce among the several States." In other words, Congress in enacting that law must have had in mind as the primary purpose of it the preservation of fair and legitimate competition. They evidently regard fair competition as a necessary incentive to business and industry, because they specifically state that every one who shall monopolize or attempt to monopolize *any part* of the trade of interstate commerce has committed a crime. Congress evidently regarded fair and legitimate competition so sacred to industry and business that it said in Section 2 of this Act, that if anyone attempt to monopolize any business and it affects any part of interstate commerce he shall be guilty, etc. Congress did not say, affect fifty per cent, or twenty per cent, or a substantial part, but it affects *any part* of interstate commerce.

If Congress in Section 2 instead of using the terms they did use, "any part," had used the phrase "not less than 10 per cent" then if the evidence in the case showed that only 9½ per cent of the business was affected, it would clearly not come under the Act; or if they had used the phrase "a part of interstate commerce" it might have been construed to mean a substantial part, but in view of the language used and the wording of the Section as a whole, we take it that Congress meant to say just what it did say; and for the Court to construe that to mean a "substantial" part would be judicial legislation. If an attempted monopolization affects any part of interstate commerce, it brings it within the jurisdiction of the United States Court and the facts in this case clearly show, beyond the peradventure of a doubt, that it did affect and burden, to say the least, that part of petitioners' business that was in interstate commerce leaving entirely out of the picture the ingredients that go into the manufacture of ice cream. It affected and burdened that part of petitioners' business in Indiana and even that part alone is enough to give the Federal Court jurisdiction of this character of an action, to-wit: an attempt to monopolize a business affecting any part of interstate commerce. In other words, in Section 2 of this Act, Congress intending to give Federal Court jurisdiction in such cases where an unlawful and unfair attempt to monopolize a business affecting any part of interstate commerce in order to break up the vicious and unlawful monopolization of industries that prevented a fair and legitimate competition in that busi-

ness. The history of the interstate commerce Act shows that its purposes were to encourage a fair competition in business.

> Apex Hosiery Company v. Wm. Leader & Am. Fed. of Hosiery Workers, 9205, decided May 27, 1940 (U. S. C.).
>
> "In order to establish violation of the Sherman Anti-Trust Act it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration."
>
> Paramount Famous Lasky Corporation v. United States, 282 U. S. 30, 75 L. Ed. 145.

In the recent case of Indiana Farmers Guide Publishing Company v. Prairie Farmers Publishing Company, 293 U. S. 268, a violation of Section 2 as well as Section 1 was alleged just as in this law suit before the Court now. The District Court and the Circuit Court of Appeals held the complainants were not entitled to recover because the evidence only showed about 10 per cent of plaintiff's business was affected. This Honorable Court, in reversing the lower Court, said:

> "Its right to recover does not depend upon the proportion that respondents control of the total farm paper advertisements in the entire country, and it was not required to prove that respondents imposed a restraint or attempted monopolization that would affect all commercial advertisements in all farm papers wherever pub-

lished or circulated. The provisions of Sections 1 and 2 have both a geographical and distributive significance and apply to any part of the classes of things forming a part of interstate commerce."

In the very recent case of Peto v. Howell, 101 Fed. (2d) 353, Seventh Circuit, which was a suit to recover damages for an attempt to monopolize a business affecting a part of interstate commerce, all of the acts complained of were local in Chicago, Illinois; and the only evidence showing an effect on interstate commerce was the fact that they did monopolize the business and in that way the Court decided that that reduced and curtailed the market on corn shipped into Chicago. The Seventh Circuit Court holding that that was within Section 2 of the Anti-Trust Act said:

> "Monopoly is the acquisition of something for one's own self, not necessarily the whole of a given commodity or the whole commerce therein but control, at least, of a part thereof sufficient to constitute withholding from the public the right to deal therein in an open market. As has been said, Congress had chiefly in mind not so much the monopoly of the whole as the much more likely case of a monopoly of a smaller part."
>
> Peto v. Howell, 101 Fed. (2d) 353, citing Standard Oil Co. v. U. S., 221 U. S. 1, 55 L. Ed. 619.

In all the strike cases that have been handed down, the complaint charges a violation of Section 1 of the Anti-Trust Act, and this Court, and most all courts, have properly held that local acts to restrain inter-

state commerce must show that the acts complained of must directly and substantially affect interstate commerce. But where the complaint charges a violation of Section 2 or a monopolization it is different, because in that section Congress was striking at monopolies and trying to encourage and protect legitimate and fair competition, and if it affects *any part* of interstate commerce it comes within the purview of the Federal Act.

III.

We think the Sixth Circuit Court of Appeals erred in the judgment of February 15, 1940, holding that:

> "The ingredients which came from without the state ceased to be a part of interstate commerce when manufactured and sold in Kentucky and were beyond the regulatory powers of Congress."

If that were true, still it could not be said that the monopolization complained of in this law suit would not affect and burden the interstate commerce of these articles before they were manufactured into ice cream. In Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. United States, 291 U. S. 292, all the acts complained of were local in New York. This Honorable Court said in that case:

> "It might be assumed that some time after delivery of carload lots by interstate carriers to the receivers, the movement of the poultry ceased to be interstate commerce. But we need not decide

> when interstate commerce ends and that which is intrastate begins. The control of handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce * * *. The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions."

That language is so strong, so clear and so convincing that it needs no comment. We could not use language that would be more convincing that the Sixth Circuit Court of Appeals erred in this case so holding as above quoted. The case at bar is a monopoly case and, therefore, much stronger.

IV.

We think that the lower court erred in its opinion that the facts in this case did not show in any way that they affected interstate commerce.

In the present case, the evidence is convincing that both parties were engaged in interstate commerce, both selling and buying, in the operation of these businesses (T. R. 53, 58, 72 and 75). If one party attempts to or does monopolize and run the other out of business, does that not affect interstate commerce? Does it not check the free flow of interstate commerce? Does it not reduce and monopolize these supplies? Would it be necessary for complainant to prove that running competitors out of business would reduce the market in

that territory? Is not that one of the things that is self-evident; that if a competitor monopolizes a business in a certain territory that that reduces the income and outgo of the commodity used in that business in that territory and defeats the very purpose of the Anti-Trust Act. To say, in the face of the facts, that it is not shown that the interstate shipments of these things were affected, is like saying that it was not shown that John Smith was affected financially when he was robbed, or it was not shown that a man's house was not a fit habitation after it was burned to the ground. There is no denying that this monopolization of the ice cream business affected the free flow in interstate commerce of butter fat, cream, fruits, flavoring extracts, gelatin and sugar. It reduced the demand of these things, and of course, the income and outgo of them. Furthermore, in view of the amount shown, two stores of petitioners in Indiana and two stores of respondents in Indiana and more than 15 carloads of ingredients shipped into Kentucky each year, shows a substantial amount. It affected and burdened the shipment of ice cream from Kentucky to Indiana, it curtailed and interfered with free competition, even though the competition in Indiana was not so strong as it was in Kentucky. It does not make any difference if there was no competition in the State of Indiana if the respondents attempted to or did monopolize the ice cream business in Kentucky, they did away with petitioners' entire business, and stopped the flow of interstate commerce, of that part of petitioners'

business going from Kentucky to Indiana. The evidence showed (T. R. 58) that petitioner had some stores in the State of Indiana and that the business transacted by petitioner in the years 1934 and 1935 ran from $138.00 to $1,423.00 per month per store, of all stores in Kentucky and Indiana.

V.

The Sixth Circuit Court of Appeals held that:

> "Competition between the parties in Louisville, Jefferson County, in no way affected interstate commerce, and the record contains no proof of conspiracy to restrain such commerce."

Citing as authority for that holding, the case of Lipson v. Socony Vacuum Corporation, 87 Fed. (2d) (C. C. A.) 1. In the case cited the only question raised was the sufficiency of the allegations in the petition. The lower Court having sustained a demurrer to the petition and dismissed the case, it was appealed upon that one question; and from a reading of the case, we cannot help but think that it was a typographical error to cite that decision in support of this finding.

Of course, if it had been a fair and legitimate competition and all the acts were in Louisville, Kentucky, and the complaint had only charged a conspiracy in restraint of commerce, the Sixth Circuit Court's holding might be sound, but in this action before the Court, there was no resemblance to a fair or a legitimate competition. The record in this case shows a most

aggravated and vicious attempt to *monopolize* the business by running a competitor out of business. It was not necessary that complaint in this action show a conspiracy to restrain commerce if the record showed, and it does show, that the respondents conspired together and did attempt to *monopolize* this business by unlawful and unfair tactics, then it was within the purview of Section 2 of the Anti-Trust Act and those facts also show an interference with the free flow of interstate commerce. From the evidence in this record, there can be but one conclusion and that is the defendants conspired, that is to say, had a working understanding with each other, to do the very things that they did do in monopolizing this business and those acts were in violation of Section 2 of the Anti-Trust Act and affected and interfered with the free flow of interstate commerce.

> "Intent to restrain interstate trade is presumed where it is the necessary result of things done or contemplated."
>
> International Organized United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Company, 18 Fed. (2d) 839.

CONCLUSION.

We think the finding of the Circuit Court below is not the law and was in direct conflict with the opinions of the Supreme Court of the United States and creates a conflict of the decisions of the Circuit Courts of Appeals, and that it was evidently misled by overlooking the fact that the Santa Cruz Fruit Packing Company v. National Labor Relations Board, cited, was not at all in line with this action for damages, but was on an entirely different proposition. The facts in this case certainly justified a submission of petitioner's cause to the jury. The jury found for the plaintiff and the verdict was not flagrantly against the evidence. We respectfully ask that the opinion of the Sixth Circuit Court be reversed and the judgment of the lower Court affirmed.

Respectfully submitted,

JOSEPH S. LAWTON,
JOSEPH SOLINGER,
CLAUDE HUDGINS,
Attorneys for Petitioner.

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MARVIN H. TAYLOR,
EDWARD P. HUMPHREY,
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Louisville, Kentucky.

July 13, 1940.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

HISTORY OF THE CASE.

This is an action in which the petitioner, C and C Ice Cream Company, a corporation of Kentucky, plaintiff in the United States District Court for the Western District of Kentucky, sought threefold damages from respondents, Ewing-Von Allmen Dairy Company, a corporation of Delaware, and National Ice Cream Company, a corporation of Kentucky, defendants in the District Court, for alleged violation of the Sherman Anti-Trust Act, U. S. C. A., Title 15, Sections 1 and 2, and of the Clayton Act, U. S. C. A.,

Title 15, Section 15.* The District Judge submitted the case to the jury, which returned a verdict against each of the respondents in the sum of $1,000.00, which sums were trebled, and petitioner's counsel were allowed a fee of $750.00 by the trial court under the provisions of the Clayton Act. The respondents appealed to the United States Circuit Court of Appeals for the Sixth Circuit, and on February 15, 1940, that court reversed the District Court in an opinion reported in 109 Fed. (2d) 898, holding that the acts complained

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*Title 15, §1, U. S. C. A.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title, as amended and supplemented: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

§2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

§15. "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

of were entirely local, done after all transportation, local and interstate had ceased, in no way affected interstate commerce and were beyond the regulatory power of Congress over interstate commerce. It is for a review of that decision that the petitioner has filed its petition for writ of certiorari.

STATEMENT.

Prior to 1933 and for many years the Ewing-Von Allmen Dairy Company and its predecessors had been engaged in the processing and distributing of milk and other dairy products in the city of Louisville, and the National Ice Cream Company had likewise been engaged in the manufacture and sale of ice cream. In 1931 the controlling interest of these companies was purchased by the National Dairy Products Corporation, a corporation of Delaware, and shortly afterward the companies were housed in one plant. The Ewing-Von Allmen Dairy Company continued to process and distribute milk and to manufacture dairy products, including ice cream. Its entire output of ice cream, however, was sold to the National Ice Cream Company, for a time at cost and later at a nominal profit. The National Ice Cream Company in turn sold ice cream throughout the city of Louisville and vicinity to retail dealers, such as drug stores, soda fountains, confectioneries, restaurants, and similar establishments which served and sold ice cream to the consuming public. It did not sell any ice cream at retail. One method of distribution followed by practically all of the retail

dealers was to sell ice cream in cones for the sum of five cents each, a cone containing an average of 2½ ounces of ice cream.

In the early part of 1933, Edward E. Coss and his son, Paul D. Coss, came to Louisville from Flint, Michigan, and established a partnership under the name of C & C Ice Cream Company, which business was later incorporated under the same name. They proceeded to rent a store building in Louisville, where they installed machinery to manufacture ice cream, with a salesroom in front of the store, and in due course opened salesrooms in other parts of the city where they sold ice cream at retail in cones, the weight of which averaged between six and seven ounces, for the sum of five cents. The effect of this method of merchandising, by which ice cream was being sold in at least double the quantity for the same price as was the general trade practice in Louisville at the time, was to greatly decrease the market for the sale of ice cream by the National Ice Cream Company.

The method of merchandising invoked by the C & C Ice Cream Company was one which had been generally discussed in the ice cream trade following the depression of 1929. A smaller type of freezer had been developed which would produce a small volume of ice cream and permit its manufacture at the store from which it could be sold directly to the consumer. The officers of the National Ice Cream Company had given the changing trend in merchandising methods very careful study and consideration, and the problem was brought squarely before them when the petitioner,

C & C Ice Cream Company, opened retail stores in Louisville and sold cones for the sum of five cents each, a cone containing a large quantity of ice cream. In order to protect the market for its product and to meet the new type of competition the National Ice Cream Company opened up retail stores of its own. In these stores electrically refrigerated cabinets were installed to preserve the ice cream, counters and other fixtures put in, and personnel employed to dip the ice cream and sell it to the consumer. The quantity of ice cream sold by the respondent, National Ice Cream Company, in cones for five cents, averaged during the ice cream season of 1933 5.2 ounces per cone, during the year 1934 4.7 ounces per cone, and during the year 1935, 4.4 ounces per cone. The respondent's stores were located in the immediate neighborhood of stores opened by the petitioner, which were competing with the retail distributors of the National Ice Cream Company's product. It is of this action of the National Ice Cream Company, in locating and opening retail stores in the city of Louisville and selling ice cream directly to the public in quantities allegedly greater, but actually equal to or less than that sold by it, that the petitioner, C & C Ice Cream Company, is complaining.

During the years here involved the National Ice Cream Company sold all of its product within Kentucky except a very small part which was sold to four retail dealers in Indiana, the quantity so sold being for 1933 76/100ths of one per cent, 1934 86/100ths of one per cent and in 1935, 1.15 per cent.

THE ESTABLISHMENT AND OPERATION BY ONE OF THE RESPONDENTS OF RETAIL ICE CREAM STORES IN THE CITY OF LOUISVILLE AND STATE OF KENTUCKY DID NOT CONSTITUTE ANY INTERSTATE TRANSACTION NOR HAVE ANY DIRECT RELATION TO INTERSTATE COMMERCE AND THE CIRCUIT COURT OF APPEALS SO HELD.

Any cause of action which the petitioner may have arose entirely out of acts committed within the city of Louisville and State of Kentucky and did not arise out of any interstate transaction, nor did those acts have any direct relation to interstate commerce. The intrastate character of the transactions complained of are emphasized by the following allegations contained in the petitioner's original petition and reiterated in each amendment thereto (T. of R. 4):

> "Plaintiff states that it manufactures ice cream and operates retail stores in the City of Louisville, wherein said ice cream is sold, and its stores are located in Louisville, Kentucky, as follows:
>
> 2301 W. Broadway
> 2702 Frankfort Ave.
> 111 S. 26th St.
> 1359 Bardstown Road
> 412 E. Oak St.
>
> "Plaintiff states that the defendant, Ewing Von Allmen Dairy Company, has maliciously conspired with its subsidiaries and associates and others to control the ice cream business in Louisville, Kentucky, and Jefferson County, and as a

part of said purpose has expressed an intention to drive the plaintiff out of its said business and to ruin the plaintiff.

"Plaintiff states that wherever in the City of Louisville it opens a store, the defendant opens, in the same locality, and as near to plaintiff's store as a location can be obtained, a store of similar kind and description, and for the purpose of retailing ice cream to the public."

The record contains no evidence even tending to show that the respondents, or either of them, sold any ice cream at retail or in competition with the petitioner, C & C Ice Cream Company, outside of the State of Kentucky, and the only connection, either direct or remote, that the petitioner attempted to show between the respondent's operation and interstate commerce was that a part of the raw materials going into the manufacture of ice cream by the Ewing-Von Allmen Dairy Company came from points outside of Kentucky, but it was not shown that any acts of the respondents resulted in any reduction or monopolization of those supplies. The Circuit Court of Appeals held that there was a complete lack of any showing by the petitioner that the establishment and operation by the respondents of retail ice cream stores all within the city of Louisville and State of Kentucky involved interstate transactions or had any direct relation to interstate commerce within the terms of the statute. If there is no direct effect or burden on interstate commerce the petitioner's case fails.

The Circuit Court of Appeals said (T. of R. 129):

> "The sole question is whether acts of the appellants in competition with the appellee have such a direct relation to interstate commerce as to affect and burden it within the purview of Title 15, Sections 1 and 2, U. S. C., and the decisions applicable thereto * * *. If so the judgment must be affirmed."

That question was answered by the court in the negative, and the respondents submit the holding of the Circuit Court of Appeals was proper and followed the decisions of this court construing the Sherman and Clayton Acts.

In the case of Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453, at page 466, in the opinion written by Mr. Chief Justice Hughes this court places the greatest emphasis on the necessity of weighing the facts in each particular case to determine whether or not they are a part of or directly relate to interstate commerce and makes it clear that in order to determine whether a transaction is connected with interstate commerce it must first appear that it had a direct and immediate and not an indirect or remote connection with interstate commerce:

> "Third. It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify

the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. Schechter Corporation v. United States, 295 U. S. 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' Id., p. 554.

"To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion."

One of the latest expressions on the subject appears in the opinion in the case of Apex Hosiery Company v. Leader, *et al.*, —— U. S. ——, decided May 27, 1940, which was written by Mr. Justice Stone:

"It was thus made apparent that in saying that 'indirect obstructions' to commerce were not con-

demned by the Sherman Act where the conspiracy is not directed at that commerce, the Court was not seeking to apply a purely mechanical test of liability, but was using a shorthand expression to signify that the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as 'to monopolize the supply, control its price or discriminate between its would-be purchasers.' And in speaking of intent as a prerequisite to liability under the Act where the restraint to interstate commerce is 'indirect' it meant no more than that the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences of the conspiracy."

The case of Foster & Kleiser Company v. Special Site Sign Company, 85 Fed. (2d) 742, decided by the Circuit Court of Appeals for the Ninth Circuit on September 22, 1936, certiorari denied, 299 U. S. 613, is cited by the Circuit Court of Appeals in its opinion in this case and is entirely in point with the facts here under consideration. The action was brought by the Special Site Sign Company to recover damages under the Sherman Anti-Trust Law and the Clayton Act because of an alleged conspiracy on the part of the Foster & Kleiser Company to secure and maintain a monopoly of the outdoor advertising business in the Pacific Coast States. It appeared that the business of both parties was that of placing advertising matter upon bill boards. They sold advertising space upon

bill boards owned and maintained by them and either pasted lithographs or advertising matter or painted the advertisement thereon. The lithographs and advertising matter were manufactured in other States and shipped into the States where they were displayed. Some of the materials used in the construction of the bill boards also were moved from one State to another. These facts were relied upon by the plaintiff to substantiate its claim of interference with and restriction of interstate commerce. The plaintiff claimed that the defendant attempted to secure a monopoly of locations for bill boards and in furtherance of that scheme interfered with the plaintiff's locations by obscuring the view of its bill boards and by other means tending to depreciate the value of the advertising service offered by it.

The Court, on page 745, said:

> "An examination of the allegations concerning the methods alleged to have been adopted by the appellant to obtain the monopoly charged indicate that these methods almost entirely relate to the securing of advertising sites, that is, locations for billboards, and with the alleged interference by the appellant with the appellee in its effort to secure and retain such advertising sites. So far as the competition between the parties to this action relates to the securing or retaining of leases for the erection and maintenance of billboards, it is clear that the operations referred to are local and beyond the power of regulation by Congress. Carter v. Carter Coal Co., 56 S. Ct. 855, 80 L. Ed. 1160, decided May 18, 1936; Schech-

ter Poultry Corp. v. U. S., 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947. Such local operations, not constituting interstate commerce, are expressly excluded by Congress from the operation of the Sherman Anti-Trust Act, which by its terms relates only to conspiracies and monopolies in restraint of interstate commerce.

* * * * * * * * *

"The appellant contended throughout the trial that the billposting business was essentially local and that interference with the leases of the appellee and with the procurement of leases, and with the display upon bill boards upon such leased premises, was purely an interference with intrastate business, and therefore not subject to control by Congress and that such damage as resulted from the acts of appellant in connection with the leases procured or sought to be procured by the appellee was not the result of an interference with interstate trade. This contention was clearly correct."

The District Court in its charge to the jury instructed that in view of the fact that the business of Foster & Kleiser was conducted in several States and that some materials for bill boards were shipped from State to State and that orders from the main office of the company were transmitted to its agencies in other States, the company was engaged in interstate commerce, and in dealing with the question of damages the court instructed that the acts of the defendant in unlawfully depriving the plaintiff of its advertising sites, securing advertising sites not reasonably neces-

sary for the defendant's operations, building structures on its own property for the purpose of obscuring sites of the plaintiff, paying more for advertising sites than they were reasonably worth, and in doing many other things all local in character, could only be considered if the jury believed that they unlawfully restrained interstate commerce in the business of outdoor advertising. In commenting on these instructions the Circuit Court of Appeals, on page 750, said:

> "The theory of these instructions, and of the appellee's whole case, was that if the business of appellee and appellant could be tied up to interstate commerce through the interstate transportation of bills and display advertising matter, then the whole business became interstate in character and any damages suffered by the appellee because of an illegal restraint in the business must be compensated by the appellant because of the liability imposed on the appellant by the Sherman Anti-Trust Act. This theory is entirely erroneous and is not the law.
>
> "(2-4) By these instructions the court ignored the hiatus which existed between the manufacture and the transportation of the lithographs, and also between the transportation and the display thereof; the display being essentially local in character after all transportation, local or interstate, had ceased. Packer Corp. v. State of Utah, 285 U. S. 105, 52 S. Ct. 273, 76 L. Ed. 643, 79 A. L. R. 546. Under such circumstances, in order to come within the provisions of the anti-trust laws, the effect upon interstate commerce must be direct and not remote and must be the result of an intent to re-

strain interstate commerce. Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963; Packer Corp. v. St. of Utah, *supra*. The mere inability of the appellant's competitors to use posters because they could not secure sites for billboards is so indirect an effect upon the commerce in billposting material as to be beyond the regulatory power of Congress. It is not covered by the Sherman Anti-Trust Act. Blumenstock Bros. Adv. Agcy. v. Curtis Pub. Co., 254 U. S. 436, 40 S. Ct. 385, 64 L. Ed. 649; Industrial Ass'n of S. F. v. U. S., 268 U. S. 64, 45 S. Ct. 403, 69 L. Ed. 849. It is true that the court instructed the jury that the mere placing of advertising matter upon sign boards 'without the presence of the other features mentioned would not in and of itself constitute interstate commerce.' But the court was evidently of the opinion, and so instructed the jury, that if the billposting was contemplated at the time the posters were manufactured and shipped for posting, then the business of billposting became interstate commerce, and appellant would be liable for damages to appellee for injuries arising from all its local acts of monopoly. In this the court erred. What occurs before transportation and after transportation in interstate commerce is generally within the legislative power of the state and not 'hat of the United States unless the effect upon interstate commerce is direct. Schechter Poultry Corp v. U. S., *supra*. The Sherman Anti-Trust Act regulating interstate commerce must be construed with reference to the respective powers of the state and the United States over the business transactions of the people."

Other questions not here involved were discussed, and in concluding its opinion reversing the case the Appellate Court, on page 754, said:

> "* * * In the absenec of an allegation of the causal connection between the damage, and the conspiracy to restrict interstate commerce in posters, no cause of action is stated under the Sherman Anti-Trust Act. For these reasons, the complaint does not state a cause of action within the jurisdiction of the federal court. The general demurrer should have been sustained.
>
> "The judgment is reversed, with directions to the trial court to sustain the general demurrer and dismiss the cause unless plaintiff applies for leave to amend its complaint to conform to the decision herein. The application to be accompanied by the proposed amendment, and to be made within thirty days after remittitur is filed in the lower court."

It is worthy of note that the petitioner makes no reference whatsoever to this case in its petition for a writ of certiorari.

In the case of Blumenstock Brothers Advertising Agency v. Curtis Publishing Company, 252 U. S. 436, in the opinion delivered by Mr. Justice Day, it was said on page 441:

> "The Anti-Trust Act, it is hardly necessary to say, derives its authority from the power of Congress to regulate commerce among the States. It declares unlawful combinations, conspiracies, and contracts and attempts to monopolize which concern such trade or commerce. It follows that if

> the dealings with the defendant, which form the subject-matter of complaint, were not transactions of interstate commerce, the declaration states no case within the terms of the act."

It is noteworthy that the case of Hopkins v. United States, 171 U. S. 578, holding that the buying and selling of live stock in the stockyards in a city by members of the stock association was not interstate commerce, although most of the live stock was sent from other states, was cited with approval in the Blumenstock Brothers case.

This fundamental requirement was stated in the case of Sullivan v. Associated Billposters and Distributors of the United States, *et al.*, 272 Fed. 323, District Court, Southern District of New York, in which the opinion was rendered by Judge Augustus N. Hand, the fourth numbered paragraph of the syllabus being as follows:

> "Before a plaintiff can recover treble damages under the Sherman Anti-Trust Act (Comp. St., sections 8820-8823, 8827-8830), there must be a direct relation between the restraint on interstate commerce complained of and the injury to plaintiff."

The petitioner has laid great stress upon the fact that certain of the raw materials and ingredients used by the parties in the manufacture of ice cream came from outside the State of Kentucky, but the record fails to show that any of the respondent's acts resulted in any reduction or monopolization of those supplies,

and the Circuit Court of Appeals so held. This court has repeatedly written that a possible reduction in the supply of an article to be shipped in interstate commerce does not furnish sufficient connection to invoke the provisions of the anti-trust laws.

In the case of United Leather Workers International Union, Local Lodge or Union No. 66, *et al.*, v. Herkert & Meisel Trunk Company, *et al.*, 265 U. S. 457, in an opinion written by Mr. Chief Justice Taft, after a careful review of the authorities, it was said on page 471:

> "This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce.
>
> "The record is entirely without evidence or circumstances to show that the defendants in their conspiracy to deprive the complainants of their workers were thus directing their scheme against interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing

which in any way directly interfered with the interstate transportation or sales of the complainants' product."

In the opinion written by Mr. Justice Sutherland in Industrial Association of San Francisco, *et al.*, v. United States, 268 U. S. 64, it was said, at page 80:

> "But this ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. The process went no further than to take away the latter's opportunity to use, and, therefore, his incentive to purchase. The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote,—precisely such an interference as this court dealt with in United Mine Workers v. Coronado Co., *supra,* and United Leather Workers v. Herkert, 265 U. S. 457."

And so can it be said in the instant case.

This Court said, at page 107, in the case of Levering & Garrigues Company, *et al.*, v. Morrin, *et al.*, 289 U. S. 103, in the opinion written by Mr. Justice Sutherland:

> "Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the re-

sult of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. Compare Bedford Cut Stone Co. v. Stone Cutters Assn., 274 U. S. 37, 46-47; Anderson v. Shipowners Assn., 272 U. S. 359, 363-364. If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 410-411; United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457. The controlling application of these cases to the present one is apparent from the review of them in the later case of the Industrial Assn. v. United States, 268 U. S. 64, 77-78, 80-82."

To the same effect are United Mine Workers v. Coronado Coal Co., 259 U. S. 344, and Hopkins v. United States, 171 U. S. 578.

In Lipson v. Socony Vacuum Corporation, 87 Fed. (2d) 265, the Circuit Court of Appeals for the First Circuit in an opinion by Judge Wilson, on page 267, pointed out:

> "The mere fact that a local transaction may cause a movement in interstate commerce is not sufficient. Moore v. New York Cotton Exchange,

et al., 270 U. S. 593, 46 S. Ct. 367, 369, 70 L. Ed. 750, 45 A. L. R. 1370, in which case the Supreme Court said:

> "If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. Ware & Leland Co. v. Mobile County, 209 U. S. 405, 412, 413, 28 S. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031. The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough."

In Apex Hosiery Company v. Leader, *et al.,* —— U. S. ——, decided on May 27, 1940, it was said:

> "And in the application of the Sherman Act, as we have recently had occasion to point out, it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation. See United States v. Socony-Vacuum Oil Co., Inc., No. 346-347, this term, note 59. *Cf.* National Labor Relations Board v. Fainblatt, 303 U. S. 601, 606."

The petitioner is proceeding on the assumption that it is only necessary to show that "any part" of commerce is affected. It does not consider the niceties of "direct and indirect" effect. It is stated baldly that there was a monopoly and that it affected interstate commerce, but it is obvious from the record and the statement of facts set out in the opinion of the

Circuit Court of Appeals that there is no evidence to show that production of milk or of other raw materials used in the manufacture of ice cream was restricted, that prices of such materials were raised or that any other control of interstate commerce in the market resulted to the detriment of purchasers or consumers of ice cream because of the competition in the retail sale of ice cream entirely within the city of Louisville and State of Kentucky. The "interference" complained of in the instant case is precisely such an interference as this court dealt with in the cases relied upon by the Circuit Court of Appeals and in those cases cited above.

DISCUSSION OF POINTS RELIED ON BY PETITIONER.

The petitioner has divided its argument into five parts, and for the sake of clarity the respondents will treat each part separately.

I.

Petitioner quotes from the opinion of the Sixth Circuit Court of Appeals in this case, but erroneously. We have set out the corrections in parentheses:

> "While the bulk of the raw ingredients used by the parties in the manufacture of ice cream (cones) comes from Kentucky, the gelatin, fruit and flavoring and part of the cream comes (fruits, flavoring and part of the milk come) from outside the state. It is not shown that appellants' acts

have shown (resulted in) any reduction or monopolization of these supplies."

In reaching that conclusion the court cited the case of United Leather Workers of America v. Herkert & Meisel Trunk Company, 265 U. S. 457. The petitioner purports to quote from the opinion in that case but the quotation is replete with error, and in order that the language of Chief Justice Taft may be properly presented we have set out the corrections in parentheses:

> "This view (review) of the case (cases) makes it clear that the mere reduction in supplies and articles (the supply of an article) to be shipped in interstate commerce by the illegal or tortuous (tortious) prevention of its manufacture (,) is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the articles (article) is to enable those preventing the manufacturing (manufacture) to monopolize the supply, control its price or discriminate (as) between its would be purchaser (purchasers) that the unlawful interference with its manufacture can be said directly to burden interstate commerce" (page 471).

The petitioner contends that the authority has been misapplied in that the facts of the instant case bring it under the latter part of so much of the opinion as is quoted, but no reference whatever is made to the record to show what are those facts. As the respondents have pointed out in the earlier part of this response, the court added to that part quoted by the petitioner:

> "The record is entirely without evidence or circumstances to show that the defendants in their conspiracy to deprive the complainants of their workers were thus directing their scheme against interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered with the interstate transportation or sales of the complainants' product."

The efforts of the respondents to maintain their Louisville market furnished insufficient evidence to show that they or either of them were directing any scheme against interstate commerce. As in the case of United Leather Workers of America v. Herkert & Meisel Trunk Company, *supra,* cited by the Circuit Court of Appeals, there are no facts to prove that "the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, etc."

The respondents have heretofore discussed cases establishing the proposition that diminution of supply as the indirect consequence of local acts does not restrain or monopolize interstate commerce. Among them are Industrial Association of San Francisco v. United States, 268 U. S. 64; Levering & Garrigues Company v. Morrin, 289 U. S. 103; United Mine Workers v. Coronado, 259 U. S. 344; Hopkins v. United States, 171 U. S. 578. As was said in the first of these cases at page 80 so can it be said in the instant case:

> "* * * there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. The process went no further than to take away the latter's opportunity to use, and, therefore, his incentive to purchase."

Here, as in that case, if the competing operator's opportunity to use milk was in any way taken away, "the effect upon, and interference with, interstate trade, if any" was no more than "incidental, indirect and remote". The interference in the instant case is such an interference as the Supreme Court dealt with in the United Leather Workers v. Herkert & Meisel case cited by the Circuit Court of Appeals and the cases above enumerated.

II.

Petitioner quotes from the opinion of the Sixth Circuit Court of Appeals as follows:

> "It is necessary that appellee prove that the dealings of appellants which form the subject-matter of the complaint operate substantially and directly to restrain and burden interstate commerce. * * * We do not regard the transactions complained of as creating direct and substantial burden on interstate commerce."

The correct and full quotation is as follows:

> "Assuming that transactions constituting intrastate commerce may come within the provisions of the Sherman Act (Local 167 v. United States,

291 U. S. 293, 297), it still is necessary that appellee prove that the dealings of appellants, which form the subject-matter of the complaint, operate substantially and directly to restrain and burden interstate commerce. *Cf.* Santa Cruz Fruit Packing Co. v. National Labor Relations Board, *supra*.

"We do not regard the transactions complained of as creating a direct and substantial burden on interstate commerce."

The court relied upon the case of Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453, for so holding. The petitioner seeks to avoid the plain effect of that case by attempting to distinguish between the use of the words "substantial burden" in the Circuit Court of Appeals opinion in the instant case and the words "substantial relation" in the Santa Cruz case, but such attempt is ineffectual, as it is difficult to conceive of any acts which create a "substantial burden" on interstate commerce that do not bear a "substantial relation" to it. The two phrases are coterminous. As is previously stated in this response, there is explanatory language in the Santa Cruz case, at page 466, following the language of that case quoted on page 11 of petitioner's brief:

"However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but

> the constitutional differentiation still obtains. Schechter Corporation v. United States, 295 U. S. 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' *Id.*, p. 554.
>
> "To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' *Whatever terminology is used, the criterion is necessarily one of degree and must be so defined.* This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion." (Italics ours.)

There is some difficulty in following the reasoning of the petitioner, but apparently the petitioner contends (1) the Santa Cruz case should apply to hold a "substantial relation" to interstate commerce existed in this case, because of the working of Section 2 of the Sherman Act, which forbids a monopoly of "any part" of interstate commerce, or (2) the case should not apply to violations of Section 2 because of the wording of the statute. At the same time, petitioner seems to view either the Santa Cruz case or the Circuit Court of Appeals opinion in this case as holding that a substantial part of interstate commerce must be affected in order to constitute a monopoly in violation

of Section 2. At any rate, petitioner violently disagrees that a substantial part must be affected, and builds itself a straw man to demolish when it argues that no certain percentage can be considered in determining "any part." A reading of the Santa Cruz case and the Circuit Court of Appeals opinion will clearly demonstrate that there is no denial in either case that "any part," a very small part, may be the object of a monopoly if the local acts are direct in their effect upon, or substantial in their relation to, interstate commerce with respect to that part. In fact, this court said, at page 467, in the Santa Cruz case:

> "There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases. The critical words of the provision of the National Labor Relations Act in dealing with the described labor practices are 'affecting commerce' as defined * * *. *It is plain that the provision cannot be applied by a mere reference to percentages and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 per cent, and not to more than 50 per cent, of its production cannot be deemed controlling.*" (Italics ours.)

Petitioner states time and again that it is only necessary to show that "any part" of commerce is affected. It does not examine the distinctions between "direct" and "indirect" effect. It simply states that

there was a monopoly and that it affected interstate commerce. To repeat, the Santa Cruz case and the Circuit Court of Appeals opinion in this case agree with petitioner's contention as to "any part" but differ with it on the matter of degree of the effect and relation as to that part.

Apparently, the case of Apex Hosiery Company v. Leader, — U. S. — (May 27, 1940) was cited in substantiation of the proposition that the amount of commerce does not determine applicability of the Sherman Act. On this point, the court said:

> "And in the application of the Sherman Act, as we have recently had occasion to point out, it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerec which are tests of violation." See United States v. Socony-Vacuum Oil Co., No. 346-347, this term, note 59 (—— U. S. ——, ——, *ante,* 760, 795, 60 S. Ct. 811, 845). *Cf.* National Labor Relations Board v. Fainblatt, 306 U. S. 601, 606, 83 L. Ed., 1014, 1018, 59 S. Ct. 668.

The Circuit Court of Appeals opinion does not disagree with this holding. The nature of the restraint was that local competition allegedly causing a decrease in interstate commerce, and the effect was remote. The authorities cited in the opinion hold a restraint of this nature to be of such effect that the Sherman Act does not apply. As elsewhere stated, the amount of the commerce was not a determining factor in the decision.

The petitioner cited Paramount Famous Lasky Corporation v. United States, 282 U. S. 30. This case

had to do with competition between parties with respect to interstate commerce, and is distinguishable in that the instant case concerns only competition in intrastate commerce. The Paramount case rested its interstate commerce jurisdiction on two cases: Eastern States Lumber Association v. United States, 234 U. S. 600; Binderup v. Pathe Exchange, 263 U. S. 291. In both the Binderup case and the Paramount case, there was a definite contract which required transportation of films in interstate commerce, and the court in the Binderup case, at page 311, said:

> "The direct result of the alleged conspiracy and combination not to sell to the exhibitor, therefore, was to put an end to his participation in that business. Interstate commerce includes the interstate purchase, sale, lease, and exchange of commodities, and any combination or conspiracy which unreasonably restrains such purchase, sale, lease or exchange is within the terms of the Anti-Trust Act, * * *. *The contracts with these distributors contemplated and provided for transactions in interstate commerce. The business which was done under them*—leasing transportation and delivery of films—*was interstate commerce.* The alleged purpose and *direct effect* of the combination and conspiracy was to put an end to these contracts and future business of the same character and 'restrict, in that regard, the liberty of a trader to engage in business,' * * *." (Italics ours.)

In the instant case the business of selling ice cream was unquestionably intrastate and the competition be-

tween the petitioner and respondents was restricted to intrastate commerce after all interstate movement had ended. There was no competition whatever in the instant case with respect to the procurement of the supplies moved in interstate commerce.

Indiana Farmer's Guide Publishing Company v. Prairie Farmer Publishing Company, 293 U. S. 268, could not conflict with the Circuit Court of Appeals opinion. The case held that plaintiff need not prove that defendants imposed restraint or attempted monopolization that would affect *all* commercial advertisements in *all* farm papers wherever published or circulated, and that the right to recover does not depend on the proportion that defendants control of the total farm paper advertisements in the entire country. It is easy to agree with this decision, because there is no issue in the instant case on whether all the raw materials for ice cream in the country, or any proportion of them, must be monopolized or restrained before Sections 1 and 2 of the Sherman Act applies, the question still remains one of direct or indirect effect on whatever part, however small, is involved. The facts show that the petitioner was able to buy as much materials as it chose at a price uncontrolled in any way by either of the respondents. Therefore, the only question was whether a diminution of supply was a direct effect of the competition. The cases hold such an effect to be remote. The Supreme Court on page 281 said in the Indiana Farmers case:

> "We intimate no opinion whether, upon the question of restraint or monopoly, or upon the

question of injury to petitioner or its business, the evidence is sufficient to warrant a verdict in its favor."

The case of Peto v. Howell, 101 Fed. (2d) 353, is likewise irrelevant and non-conflicting. It holds that interstate commerce in corn shipped to Chicago was a sufficient part of all interstate commerce in corn to be protected against monopoly. The direct effect on commerce in creation of the monopoly was the enhanced price on the corn which diverted it from other markets to Chicago and collected it into the hands of the defendant. In other words, the local acts affected the price of the commodity. The local acts in the instant case had no effect on price and could not be held a monopoly on that score.

The conclusion that the strike cases under Section 1 of the Sherman Act were decided by a rule on "burden and effect" not applicable to monopolies under Section 2 is not supported by any case we have been able to find. On the contrary, the case of Foster & Kleiser Company v. Special Site Sign Company, 85 Fed. (2d) 742, 299 U. S. 613, discussed at length in the early part of this response and which petitioner studiously ignores throughout its brief, and cases cited therein, definitely decide that the burden or effect or interference or obstruction is determinative in cases arising under Section 2 as well as under Section 1.

III.

The petitioner complains of the decision of the Sixth Circuit Court of Appeals in this case holding that:

> "The ingredients which came from without the state ceased to be a part of interstate commerce when manufactured and sold in Kentucky and were beyond the regulatory powers of Congress."

At the outset the respondents point out that the excerpt from the opinion of the Circuit Court of Appeals quoted by the petitioner is incorrect and misleading in that an important part is omitted from the middle of the quotation. It should read as follows:

> "We do not regard the transactions complained of as creating a direct and substantial burden on interstate commerce. The ingredients which came from without the state ceased to be a part of interstate commerce when manufactured and sold in Kentucky. The sales in appellants' retail stores were entirely of a local nature, made after all transportation, local and interstate, had ceased, and were beyond the regulatory power of Congress over interstate commerce."

The petitioner continues to urge applicability of Local 167, International Brotherhood of Teamsters, *et al.*, v. United States, 291 U. S. 293, despite the obvious conclusion that the facts showing the degree of burden and effect in that case are in no way analogous to those in the present case.

Local 167 and others appealed from an injunction against a conspiracy participated in by it and others to restrain and monopolize interstate commerce in live and freshly dressed poultry in violation of the Sherman Anti-Trust Law. The interstate character of the actions of Local 167 is highlighted by the discussion of that case appearing in the opinion in Schechter Poultry Corporation v. United States, 295 U. S. 495. At page 544 in the opinion by Mr. Chief Justice Hughes it is said:

> "We recently had occasion, in Local 167 v. United States, 291 U. S. 293, to apply this principle in connection with the live poultry industry. That was a suit to enjoin a conspiracy to restrain and monopolize interstate commerce in violation of the Anti-Trust Act. It was shown that marketmen, teamsters and slaughterers (shochtim) had conspired to burden the free movement of live poultry into the metropolitan area in and about New York City. Marketmen had organized an association, had allocated retailers among themselves, and had agreed to increase prices. To accomplish their objects, large amounts of money were raised by levies upon poultry sold, men were hired to obstruct the business of dealers who resisted, wholesalers and retailers were spied upon and by violence and other forms of intimidation were prevented from freely purchasing live poultry. Teamsters refused to handle poultry for recalcitrant marketmen and members of the shochtim union refused to slaughter. In view of the proof of that conspiracy, we said that it was unnecessary to decide when interstate commerce

ended and when intrastate commerce began. We found that the proved interference by the conspirators 'with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted' operated 'substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry' while unquestionably it was in interstate commerce. The intrastate acts of the conspirators were included in the injunction because that was found to be necessary for the protection of interstate commerce against the attempted and illegal restraint. *Id.,* pp. 297, 299, 300.

"The instant case is not of that sort. This is not a prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. Defendants have been convicted, not upon direct charges of injury to interstate commerce or of interference with persons engaged in that commerce, but of violations of certain provisions of the Live Poultry Code and of conspiracy to commit these violations. Interstate commerce is brought in only upon the charge that violations of these provisions—as to hours and wages of employees and local sales—*'affected'* interstate commerce.

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle.

> Direct effects are illustrated by the railroad cases we have cited, as *e. g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government."

The misquotation from the opinion of the Circuit Court of Appeals in the instant case tends to give a warped view of the court's holding. The court did not undertake to say that the commodities mentioned are beyond the control of Congress solely because they are in intrastate commerce. It did hold, and rightly so, that the sales described in the omitted portion of the quotation were beyond the control of Congress under the authority of Foster & Kleiser Company v. Special Site Sign Company, 85 Fed. (2d) 742, 299 U. S. 613, the citation of which in the opinion followed the language quoted by the petitioner as contrary to the

Local 167 case. Petitioner did not include the Kleiser case in the excerpt because to have done so would have placed it under obligation to explain away that case, which it could not do.

IV and V.

In Section IV of petitioner's brief it is claimed that "the lower court erred in its opinion that the facts in this case did not show in any way that they affected interstate commerce." In Section V the petitioner quotes from the opinion of the Sixth Circuit Court of Appeals as follows:

> "Competition between the parties in Louisville, (and) Jefferson County, in no way affected interstate commerce, and the record contains no proof of conspiracy to restrain such commerce."

The conjunction in parentheses is added to make the quotation conform to the context of the opinion. The commas after the words "Louisville" and "County" in the above quotation do not appear in the opinion.

Inasmuch as the burden of Sections IV and V is the same they shall be discussed together.

The last case mentioned in petitioner's brief was International Organization, United Mine Workers of America, *et al.*, v. Red Jacket Consolidated Coal and Coke Company, 18 Fed. (2d) 839. That case turned on the second Coronado case, namely, Coronado Coal Co., *et al.*, v. United Mine Workers of America, *et al.*, 268

U. S. 295, wherein the rule in the first Coronado case, namely, United Mine Workers of America, *et al.*, v. Coronado Coal Company, *et al.*, 259 U. S. 344, United Leather Workers, etc. v. Herkert & Meisel Trunk Company, 265 U. S. 457, and Industrial Association of San Francisco v. United States, 268 U. S. 64 (cited above) was recognized but distinguished in these words on page 310: "We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other States than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines, * * *" The Red Jacket case on page 845, then went on to say:

> "We think there can be no question that the case at bar falls within the rule just quoted from the second Coronado decision." (Facts were then stated to show that the real purpose of the conspiracy was to stop the shipments of interstate commerce.) *"And where the necessary result of the things done pursuant to or contemplated by the conspiracy is to restrain trade between the states, the intent is presumed.* United States v. Reading Co., *supra,* at page 370. Defendants must be held 'to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is

> designed to prevent, they are, in legal contemplation, chargeable with intending that result.' U. S. v. Patten, 226 U. S. 525, 543 * * *." (Italics ours.)

The petitioner did not quote the italicized statement as to presumption of intent or discuss it from point of context; the headnote alone was quoted. The statement is quite consistent with the law applied by the Circuit Court of Appeals in the instant case for the simple reason that the facts in the two cases are very different. If the "necessary and direct consequences" of the acts of the defendants in the instant case were to monopolize commerce, it would not be required to prove that the defendants expressed an intent to accomplish that result. The intent could in such circumstances be presumed. The facts to invoke the presumption are missing here.

The citation by the Circuit Court of Appeals of the case of Lipson v. Socony Vacuum Corporation, 87 Fed. (2d) 265, is dismissed in the petitioner's brief as a typographical error. The language from that case, quoted on page 19 of this brief, goes to establish that a local transaction causing a movement in interstate commerce is not sufficient to make the transaction interstate. In the Lipson case the court seemed to regard it as necessary that acts be *in* interstate commerce before they might tend to create a monopoly, for it said on page 268:

> "Assuming that the declaration to the above extent sets forth transportation of gasoline from

refinery to retailer in interstate commerce, has the plaintiff also alleged with substantial certainty the *other necessary facts* to render the defendants liable under sections 2 and 3 of the Clayton Act (15 U. S. C. A. §§13, 14)?"

CONCLUSION.

In the first part of this brief we have set out the salient facts of this case as developed in the record and have discussed them in the light of the applicable authorities, which we most earnestly contend fully support the opinion of the United States Circuit Court of Appeals for the Sixth Circuit, in which it was held that the sale of ice cream in cones at retail in the city of Louisville and State of Kentucky was entirely of a local nature, in no way affected interstate commerce, and was not violative of either the Sherman Anti-Trust Law or the Clayton Act.

In the second part of the brief the respondents have reviewed the points made by the petitioner in support of its petition for writ of certiorari, and we respectfully maintain that the opinion of the Circuit Court of Appeals for the Sixth Circuit is sustained in every particular by the record in this case and is in accord with the opinions of this court and of the decisions of the other federal courts.

We ask that the petition for writ of certiorari be denied.

Respectfully submitted,

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